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BRIEF FOR APPELLANTS.

Supreme Court of the United States

OCTOBER TERM, 1904.

NO. 23.

C. EWING PATTERSON ET. AL.,
APPELLANTS,
vs.
JOHN Y. HEWITT ET. AL.

APPEAL FROM SUPREME COURT OF NEW MEXICO.

W. B. CHILDERS,
F. W. CLANCY,
Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1904.

C. EWING PATTERSON ET. AL.,
vs.
JOHN Y. HEWITT ET. AL.
} No. 24

APPEAL FROM SUPREME COURT OF NEW MEXICO.

STATEMENT OF CASE.

This case was begun on the 29th of April, 1893, in the district court for Lincoln county, by the filing of a bill of complaint on behalf of C. Ewing Patterson, a resident of New Jersey, and Henry J. Patterson, a resident of New Mexico, against John Y. Hewitt,

William Watson, Mathew Hoyle and Harvey B. Fergusson, residents of New Mexico, and Old Abe Company, a New Mexican corporation.

BILL OF COMPLAINT.

The case set up by the bill of complaint is substantially as follows:

Complainants, with Charles A. Buford, Edward Morrow and defendant Watson, made a mining location in the White Oaks mining district in October, 1881, of a claim known as Consolation lode, within which Henry J. Patterson had discovered mineral-bearing rock in place; and the said parties immediately after claimed and located a tunnel site called the Hidden Treaure for the purpose of developing the veins and lodes of the Consolation. Buford and Morrow shortly afterward abandoned the property and have never made any claim thereto since that time, Morrow having left the country and Buford having been accidentally killed two or three years before this suit was begun. Complainants continued work on the claim and tunnel site, and before the end of 1883 discovered another vein, which is the one upon which other locations called the White Oaks and Robert E. Lee were afterwards made; and upon which nearly all of the operations of the defendant company have been carried on. Prior to this a claim had been located by three persons named Allen, Livingston and Kelsey, which was called the Old Abe, and which conflicted with the Consolation claim. Complainants and Watson asserted that these locators had failed to do their work and had lost their

rights, but this was not admitted and was a matter of dispute. In the latter part of 1883 a meeting was held at White Oaks for the purpose of harmonizing the different interests, at which meeting there were present the complainants, the defendants Watson and Hewitt, one Chase as administrator of Allen, and four persons, named Redmond, Woodland, Hockradle and Hathaway, who claimed to own the interest of Livingston. At that meeting it was agreed that all previous locations should be abandoned, that a new location should be mde by Hewitt in his own name as trustee of all of said parties for his and their benefit upon the discovery which had been made by Patterson, and that he should receive an eighth interest for his services. It was further agreed that the property should be owned by the two Pattersons, Watson, the heirs of Allen, one Spiegelberg, Kelsey and Hewitt, an eighth each; Hockradle and Hathaway, one twenty- fourth each, and Redmond and Woodland, one twenty-fourth jointly. Shortly after the meeting Hewitt advised the other parties that Spiegelberg really had no interest, and it was agreed that his share should be sold to defendant Fergusson for $500 to be used in development work. It was further agreed that each of the parties should contribute his proportionate share towards performance of enough work to entitle the owners to a patent from the United States, and that Hewitt should apply for the patent and attend to all of the business connected therewith; and Hewitt agreed to make the locations and convey to the parties respectively their interests in

the property when they should have carried out their agreement as to the performance of work.

The parties in interest immediately went to work upon the property, the work being carried on under the superintendence of Henry J. Patterson and within less than a year work had been done in value not less than $1,500.

On the 2nd of May, 1884, Hewitt made the two locations called the Robert E. Lee and White Oaks, respectively, upon the vein discovered by complainant, Patterson.

In the winter of 1884 and 1885 Patterson applied to Hewitt several times for his deed, but was put off by Hewitt on various pretexts. Patterson then decided to leave that district temporarily with the hope of returning as soon as able to resume work on the property, and he arranged with Hewitt for the delivery of his deed to another person after he went away.

Accordingly he did leave in March, 1885, and from that time until the summer of 1892 was engaged in prospecting and mining nearly all of the time outside of New Mexico and in every State and Territory west of the Rocky Mountains and in Lower California, but without the accumulation of sufficient money to return to White Oaks as he had intended. Up to the fall of 1891 he knew nothing about the property in question, but at that time by means of a newspaper he learned that the property was being operated at a profit and he returned to New Mexico as soon as he possibly could, arriving in the Territory in June, 1892.

The other complainant, C. Ewing Patterson, removed from New Mexico to New Jersey about the end of the year 1883, leaving his business in the hands of his brother, and of his partner, the defendant Watson. has never returned to New Mexico and never knew anything about the development and operation of the property until informed by his brother in 1892.

It was alleged upon information and belief that Hewitt had admitted complainant's interest and had not denied their rights until after they had both left New Mexico, but that he had for several years given out that complainants had no right and he had refused and still did refuse to acknowledge their rights and to make them deeds.

Complainants further set out certain conveyances between the defendants by which apparently nearly all of the title was conveyed to the Old Abe Company; and that applications were made in September, 1889, by Hewitt, Watson and Fergusson for patents to the two claims.

The defendants had been carrying on mining operations on the claims and had extracted large quantities of mineral and converted the same to their own use. the aggregate value being alleged upon information and belief as not less than $600,000, and refused to account for the same or any portion thereof to complainants.

Complainants prayed that Hewitt should be decreed to have acquired title to the two claims in trust for the benefit of the complainants to the extent of one-fourth thereof; that the other defendant be declared

to have taken title to portions of the claims with notice of the rights of complainants; that complainants have a lien upon the property in the hands of the other defendants to the same extent as they might have had in the hands of Hewitt; that an account be taken of all ore extracted and that Hewitt should be required to pay over to the complainants one-fourth of the value of all ore taken from the claims without any allowance for costs or expenses; that Hewitt and the Old Abe Company should be required to convey to complainants fourth thereof; that the other defendants be declared an undivided one-fourth part of the claims, the court making such provision in its decree as might be necessary for the protection of stockholders in the company other than Hewitt; and, in case Hewitt should not be possessed of sufficient money fully to pay what might be found due to complainants, that the other defendants should be required to pay the deficiency and that complainants have a lien upon the two claims for the payment of such deficiency; and there was also a prayer for general relief.

ANSWER OF DEFENDANTS.

To this bill of complaint the defendants filed their answer on the 27th of June, 1893, and by that answer every material allegation of the bill of complaint was either denied, or not admitted and proof thereof called for. By the answer it was admitted that in the latter part of 1883 a meeting was held at White Oaks as alleged in the bill, but it was denied that it was for any such purpose as was set up in the bill although the an-

swer did not show for what purpose the meeting was held. It was admitted that Hewitt did make the two locations, but it was denied that he made them under any promise or agreement to act as trustee as alleged in the bill.

It was specifically denied that Henry J. Patterson ever applied to Hewitt at any time for any deed for his pretended interests. It was admitted that Henry J. Patterson did leave New Mexico and it was averred that he then and there abandoned the property and had failed to pay any part of the costs, labor and expenses of locting the lead or of developing the same or of performing annual assessments thereon, and that neither of complainants then had or had afterwards acquired any interest in law or in equity in the property. It was further alleged in the answer that whatever right the complainants might have had, had been forfeited because of their failure to contribute to the annual assessment work during the years 1884 and 1885 and that at the end of 1885 notice had been given as required by the United States statute in a newspaper calling upon complainants to contribute their share to such assessment work which they failed and refused to do.

The answer also set up the statute of frauds as a bar, and that complainants had been guilty of laches. It did not plead any statute of limitations.

FINDINGS BY THE COURT.

It will be seen that the case made by the bill was one of a trust under an agreement with Hewitt which

agreement had been fully performed by the other partie thereto; while the answer absolutely and utterly denied that any such agreement ever was made or that any such trust existed.

We are not permitted in this court to go into a consideration of the facts as shown by the proofs, but are limited to what appears from the findings of the courts below. The act of congress of 1874 relative to appeals from territories, cuts off any review of the testimony.

The findings of fact made by the district court, and afterwards adopted by the supreme court of the territory, will be found at pages 40 to 43 of the printed record. Reference is made to these pages although the findings appear twice elsewhere in the record, because at this place some minor errors in names and dates are corrected.

The findings of the court which are numbered from one to twelve, both inclusive, fully and entirely sustain the case of complainants, showing as they do the early occupation of the mining ground in dispute by the complainants and Watson, the dispute as to the title between them and other parties, the discovery of rich ore prior to August, 1883, by one of complainants, the holding of the meeting as alleged in the bill, the agreement that all old locations should be abandoned and the ground taken by a trustee, Hewitt being designated as such trustee, he to convey to each of the parties his proportionate interest if he contributed his part of the labor and expenses in doing the necessary work in order to obtain a patent, the two complainants, and

defendants, Hewitt and Watson each to receive a one-eighth interest; that the work was done as agreed between August, 1883, and April, 1885, and that complainants contributed their full share, and in April, 1885, were each entitled to a deed from Hewitt as trustee for their interests in the property.

The whole case of the complainants having thus been found in their favor by the court, it is evident that the adverse decision of the court below must rest upon other facts outside of those relied upon by complainants, and we turn to the remaining findings to ascertain what those facts can be.

The other findings of the court are, in substance, that Henry Patterson in person and by an agent in April, 1885, demanded a deed from Hewitt and that Hewitt declined and refused to make the deed; that Hewitt has never made such deed, but has always declined and refused to make the same and has disputed the right of complainant to his deed; that Ewing Patterson demanded his deed from Hewitt for the first time immediately prior to the institution of this suit, and that Hewitt refused to make such deed; that during the years 1885 to 1890, Hewitt, Watson and Fergusson did a large amount of work and expended a large amount of money on the property, and that complainants have never contributed or offered to contribute any part of such expenses; that in November, 1890, Watson, Fergusson and Hewitt discovered a large body of rich ore, and have taken out a large amount of gold amounting to several hundred thousand dollars;

that Ewing Patterson left New Mexico in the year 1892 (thi should be 1883,) and has never since returned; that Henry J. Patterson left White Oaks in the latter part of March, 1885, and from that time until the fall of 1892, was a non-resident of this Territory; that since he left this Territory, neither he nor C. Ewing Patterson in any way contributed to the development of the property, and took no steps prior to the bringing of this suit to enforce their rights or to require Hewitt to carry out his agreement, and took apparently no interest in the property and made no effort to enforce their rights until the institution of this suit; that Henry Patterson, through his agent Burgess, had knowledge that Hewitt refused to carry out the agreement; that he had such notice in April, 1885, and again in the summer of 1887, and that he and his co-complainant were fully advised "after April, 1885," that Hewitt refued to carry out the agreement.

As a conclusion from these findings of fact the court held that complainants were barred and that the bill should be dismissed.

There is one other finding of fact not included in the above statement, numbered 18, which shows that there had not been down to January, 1896, when defendants' testimony was taken, any substantial change in the parties interested in the property so that there would be any obstacle to giving plaintiffs the relief prayed for upon the ground that innocent purchasers for value and without notice had become interested in the property.

It is evident from the foregoing statement that the court denied the right of complainants to the relief sought, on the ground of their supposed laches in asserting their rights, but it is to be noted that nothing more than mere delay is imputed to them.

The complainants have made and filed in this court the following:

ASSIGNMENT OF ERRORS.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 254.

C. EWING PATTERSON, ET AL.,

vs.

JOHN Y. HEWITT, ET AL.

Now come the appellants, by their attorneys, and say that there is manifest error in the record, proceedings and decree in this cause in the courts below, and specify the following as assignments of errors therein:

1. The courts below erred in finding that neither of the complainants ever contributed or offered to contribute any part of the expense of the work done by Hewitt, Watson and Fergusson during the years 1885 to 1890, because that fact is immaterial, as complainants were under no obligation so to contribute.

2. The courts below erred in failing to find as to whether complainants were ever called upon by anyone

to contribute to the work done from 1885 to 1890.

3. The courts below erred in holding as a conclusion from the facts established, that the complainants were barred from any right of recovery, as the findings of fact do not support such conclusion.

4. The courts below erred in failing to hold, as matter of law, that the facts found, established the existence between complainants and defendants of a mining partnership for a limited and definite purpose, terminable only by the making by defendant Hewitt of the deeds to complainants to which the latter were entitled as the court found.

5. The courts below, having found as matter of fact that complainants fully performed all required of them by the agreement of 1883 so as to entitle them to deeds from defendant Hewitt, who refused to give the deeds, erred in failing to hold, as matter of law, that Hewitt's standing in a court of equity, with unclean hands, was such that he could not be allowed to avail himself of any such defense against the consequences of his proved wrong-doing, as that growing out of the equitable doctrine of laches.

Wherefore, appellants pray that the decree of the court below, be reversed, and that this cause be remanded with directions to enter a decree in favor of complainants establishing their respective rights to an undivided one-eighth interest each in the property in controversy, and to take an account of what may be due to them from defendants or any or either of them for

their shares of the profits of the said property, or that this court may enter such decree as to it shall seem proper and equity may require.

W. B. CHILDERS,
F. W. CLANCY,
Attorneys for Appellants.

POINTS AND AUTHORITIES.

It is to be observed from the statement of facts hereinbefore set forth, that, at this time, in this court, it is not necessary to discuss the merits of complainants' case as set out in their bill, as that matter is fully settled by the findings of the court below which show beyond all doubt that the complainants certainly were at one time fully entitled to all that they seek in the present litigation; and the main question to be considered is as to whether by their own conduct they have cut themselves off from any standing in court in this suit.

We propose, however, first to show that the agreement set forth in the bill of complaint and found by the court, constituted a mining partnership for a definite, limited purpose, which partnership has never been dissolved; and that the finding that complainants after 1885 did not contribute to the development of the property, is immaterial as they were under no obligation so to contribute.

We propose to show, also, that the circumstances of the present case, as found by the court, are such that there is no room for the application of the doctrine of laches, and that even if there were, the equitable doctrine of laches with regard to this class of cases, has been entirely wiped out by statutory enactment and no delay short of the statutory period of ten years will bar such a suit as this one.

We will then briefly consider the opinion of the supreme court of New Mexico and point out wherein it

fails to meet the argument of appellants, and wherein it errs in resting the decision upon a statute of limitations which was never pleaded by defendants, and which, if pleaded, would have been inapplicable.

FIRST POINT.

The agreement of 1883 created a mining partnership between all the parties thereto, with one of them, Hewitt, as trustee to hold the legal title for the benefit of the others.

The bill of complaint asserts, the answer denies, and the courts below find, that Hewitt was trustee for all interested. Undoubtedly the trust relation was established and clearly recognized.

That the arrangement between the parties constituted a mining partnership will be clear by reference to any authority on the subject, although this partnership was limited in extent, and clearly terminable by Hewitt's making deed as he agreed.

Manville vs. Parks, 15 *Mining Rep.*, 656; 7 *Colo.*, 128.

Hirbour vs. Reeding, 11 *Mining Rep.*, 514; 3 *Mont.*, 15.

Skillman vs. Lachman, 23 *Cal.*, 203.

Settembre vs. Putnam, 11 *Mining Rep.*, 425; 30 *Cal.*, 490.

That such an agreement is not within the statute of frauds is well settled.

Munley vs. Ennis, 2 *Colo.*, 300.

Meyiette vs. Brennan, 20 *Colo.*, 242.

Hirbour vs. Reeding, 3 *Mont.*, 15.

Raymond vs. Johnson, 17 Wash., 232.
Moritz vs. Lavelle, 77 Cal., 10.

But if it were, complete performance by complainants, as found by the courts below, would be sufficient to avoid the effect of the statute.

There never has been any dissolution of this partnership or any settlement or adjustment of the partnership affairs or any division of the partnership property. The unprincipled conduct of Hewitt as found by the courts below can have no effect upon the rights of his co-partners. Had he been honest in his claim that the Pattersons were entitled to nothing under the partnership agreement, the courts were open to him for the assertion of his claims, and he could have brought suit for a dissolution of the partnership and accounting, but no such suit was ever brought by him or any of the defendants, and they now set up that complainants are in fault. Partners cannot be allowed by sitting still in this manner, to absorb partnership property. If any one has been guilty of laches and neglect, it is Hewitt rather than the complainants. The courts have found that the duty rested on him of making deeds to the complainants, and that he neglected and refused to discharge that duty. Had he honestly performed what he had agreed to do, he would then have some standing in a court of equity to complain if the Pattersons had taken no further part in the development of the property, but he is clearly in no position to invoke the interposition of a purely equitable doctrine to protect him

in the possession of property to which he holds the title only through a violation of his agreement.

It may be suggested in answer to this argument, that the bill of complaint does not in terms declare that the agreement constituted a partnership, and that it does not pray for a dissolution of the partnership. The statement that a partnership existed or that any agreement made created a partnership, is the allegation of a mere conclusion of law, and, therefore, unnecessary. The complaint sets out the facts of the agreement quite fully, and the courts have found the facts to be substantially as stated in the bill. If those facts constitute a partnership as matter of law, any court at any stage of the proceedings can properly so hold.

As to the objection that the bill does not pray the dissolution of the partnership, it is sufficient to say that the bill contains a prayer for general relief, and it is the settled doctrine of courts of equity that under such a prayer any relief consistent with the case stated in the bill of complaint can be given, although not specifically prayed for.

Texas vs. Hardenberg, 10 *Wall.*, 85 *et seq.*
Tayloe vs. Ins. Co., 9 *How.*, 406.
Jones vs. Van Doren, 130 *U. S.*, 692.
Hall vs. Lonkey, 57 *Cal.*, 80.

SECOND POINT.

Complainants were under no obligation to contribute to the development of the property.

This point is made, because the courts below, in the 16th and 21st findings of fact, set out that after Henry

Patterson left New Mexico in April, 1885, neither he nor the other complainant contributed any means or labor for the development or improvement of the property, and it appears from the opinion of the supreme court of New Mexico, that this was one of the principal considerations which led that court to its decision adverse to complainants. In that opinion, the court even comments upon the failure of complainants to contribute to the performance of assessment work required to sustain the possessory title prior to patent. This is extraordinary in view of a distinct adjudication by this court, which makes it plain that the Pattersons could not be called upon to contribute even to the assessment work,—an adjudication to which the attention of the territorial supreme court was distinctly called.

Turner vs. Sawyer, 150 *U. S.*, 583-4.

It is to be noted, as appears from defendants' answer, that Hewitt made an attempt to "advertise out" the complainants, but the case above cited made this such an immaterial matter, that no finding was made by either of the courts below as to the advertising.

Had Hewitt honestly complied with his agreement, and executed and delivered deeds to the Pattersons when the deeds became due, they would have been vested with title so that they would have been liable for their portion of the annual assessment work. That would, however, have been the full extent of their liability to their co-owners if the deeds had been made. There can be no doubt that if one or more of several

tenants in common of an unpatented mining claim, chooose to expend large or any amounts of money in development or other work, no liability rests upon the other owners to contribute to such work or to reimburse those owners who choose to make such expenditures.

Moreover, it does not appear that complainants were ever called upon to contribute anything to any work upon the property, or that they ever had any opportunity or would have been permitted by Hewitt and Watson so to contribute.

It is respectfully submitted that these findings of the court below, to which the supreme court of the territory appears to attach great importance, were entirely immaterial. It is not made to appear that complainants knew anything whatever about the expenditures being made on the property after the spring of 1885, but if they had, their failure to join with defendants could work no forfeiture of their interests.

THIRD POINT.

The utmost effect that can be given to the court's findings against complainants is that they delayed the assertion of their rights.

A careful examination of all of the findings of the court after the 12th finding, will show that nothing is imputed to the complainants beyond mere delay and neglect. There is not a single act attributed to them or to either of them by the court which would induce the defendants to believe that they, complainants, acquiesced in the shameful robbery which the court below finds, in effect, that Watson and Hewitt combined to

perpetrate. Nothing was ever done by complainants or by either of them which could have induced the defendants to expend a dollar more on the property than they otherwise would. As we will hereinafter show, these findings thus lack one of the most important and essential ingredients of a case to which the equitable doctrine of laches should be applied.

FOURTH POINT.

There is no room for the application of the doctrine of laches in the present case.

It is clear that the solution of this question may turn upon the application of the New Mexican ten year statute of limitations; but we contend that no matter what construction is given to that staute, or if the statute be disregarded, the complainants cannot be considered as barred in the present case. It will be convenient to consider this question under three sub-headings:

A.

Nothing less than the lapse of ten years can bar complainants.

The argument would seem to be strong that when a legislature passes a statute of limitation applicable to equity and law alike, it should be enforced and followed precisely the same in both jurisdictions, and that the defense of laches and staleness of claims is no longer permissible. Otherwise, the judge substitutes for the legislative will, his own idea as to the length of time which may or may not be sufficient to bar a complainant of his remedy. The theory upon which the opposite

view is maintained, is that courts of chancery have always had and exercised, in the absence of any statute of limitations applicable to equity cases, the power of refusing to entertain stale claims, and that, unless there is an express legislative declaration that that power is taken away, it must be considered as continuing notwithstanding the enactment of a statute of limitations for the government of those courts. This is illogical and unreasonable,—an artificial and specious kind of reasoning by which it is sought to defeat the obvious legislative intent.

The statute of New Mexico in question is as follows:

> No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and that all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within ten years next after the title or cause of action or suits accrued or fallen, and at no time after the ten years shall have passed: *Provided*, That if any person or persons that is or shall be entitled to commence and prosecute such suit or action in law or equity be or shall be, at the time of said right or title first accrued, come or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the limits of the United States and the territories thereof, that then such person or persons, his, her or their children, heirs, or assigns, shall and may, notwithstanding the said ten years be expired, bring his or her suit or action, as he, she or they might have done before

> the passage of this act, so as such person or persons, his, her or their children, heirs or assigns, shall within three years next after his, her or their full age, discoverture, coming of sound mind, enlargement out of prison, coming into the United States or the territories thereof, or death, take benefit of and commence such suit, at no time after the said three years: *Provided, also,* That in the construction of this saving exception, no cumulative disability shall prevent this bar, but shall only apply to that or those disabilities which existed at the time when the right to sue first accrued, and to no other. *Provided, further,* That such action so commenced shall be an action prosecuted with effect and no other.
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> *Compiled Laws of* 1897, *Sec.* 2938.

It is to be noted that, at the time of the passage of the foregoing law, in 1858, the following sections of an act of 1851 were in force:

> Sec. 5. The distinctions known to the common law of England and the United States between courts of chancery or equity, and of courts of common law, and the distinctive jurisdiction of said courts in regard to the subject matter in controversy, shall not be regarded or recognized in the practice of the courts of said Territory.
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> Sec. 6. The names and distinctions between different actions as known to the common law of England and the United States shall not be deemed material by the courts of said Territory, and all matters of complaint or defence between the parties of a like nature may be joined respectively in the petition or answer.
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> *Compiled Laws of* 1865, *p.* 192.

The same legislative intent to make statutory limitations apply to suits in equity as well as actions at law,

is to be found in the statute of 1880, which appears as Sections 2913 to 2932 of the Compiled Laws of 1897. In Section 2913, it is said that "The following suits or actions may be brought within the time hereinafter limited respectively after their causes accrue, and not afterwards." By using the words "suits or actions", which are technically applicable to equitable and law cases respectively, the legislative intent is apparent. Section 2916 refers, among other things, to suits or actions brought "for relief upon the ground of fraud," which covers a large field of equitable jurisprudence. Section 2918 refers to actions for "relief on the ground of fraud or mistake." Section 2930 contains a declaration that none of the provisions of the act "shall run against causes of actions arising out of trusts when the defendant has fraudulently concealed the cause of action."

We will first consider our statute as merely prescribing a limitation beyond which suits in equity cannot be brought, contending that, even if it contained no more, complainants have the full period fixed, within which to sue; and we will then show that the language of the statute distinctly authorizes such a suit at any time within ten years. Under either view, the legislature has done away with the defense of laches.

Considered as a statute of mere limitation, it seems desirable to present the question in the light of precedent. We will, therefore, briefly submit a few of the authorities which support our position.

At some time prior to 1839, a statute was enacted

in the state of New York which fixed a ten years' period of limitation as to suits of exclusive equity cognizance. With this statute in force, Vice-Chancellor Whittlesey held that the lapse of five years after the rendition of a judgment and return of execution prior to the filing of a creditor's bill, made the demand a stale one, not to be countenanced by a court of equity.

Storms vs. Ruggles, Clark's Ch., 149.

If this ruling had been allowed to stand, it would be a strong one in favor of defendant in the present case, but in a later case Chancellor Walworth declared that *Storms vs. Ruggles* had frequently been overruled. He uses the following language:

> After the complainant has once exhausted his remedy at law by the return unsatisfied of an execution which has been issued to the proper county, the statute gives him the right to come here for the purpose of reaching the equitable interests and things in action of the defendant. And I know of no limitation of that right, short of the ten years which the statute has fixed as the time within which suits purely of equitable cognizance must be brought in this court.

Corning vs. Stebbins, 1 *Barb. Ch.*, 591.

In another case where a bill was filed for the purpose of compelling the execution of a conveyance by defendants, the right to such conveyance had arisen in the year 1813, and the bill was filed in April, 1835. The person entitled to the deed, however, remained in possession of the property until 1829, when he was dispossessed and brought his bill six years later. These facts appear in the decision of Assistant Vice-Chancel-

lor Murray Hoffman, and he held that no rule of limitation could run against complainant while he held the possession.

Varick vs. Edwards, Hoffman's Ch., 417.

The same case coming before Chancellor Walworth, he disposed of the question in the following language:

> The equitable owner of the premises was in possession of the property, under this deed, at the death of Joseph Eden. And not having been disturbed in such possession until he, or those claiming under him, were turned out of possession by the holder of the legal title, under the judgment in ejectment, in 1829, time was not a bar to the complainant's suit in equity; nor did the statute of limitations commence running until such eviction. The complainants having no remedy at law, their right in equity could not be barred except by the ten years' limitation as to suits of exclusive equity cognizance, prescribed by the revised statutes; and this suit was brought within the ten years.

Varick vs. Edwards, 11 *Paige's Ch.*, 291.

In the state of Mississippi there is a statute which appears to be similar to ours, and in a recent case counsel for defendant urged in the supreme court the same arguments that are set up in the present case by counsel for defendants, but the court disposed of the contention in the following language:

> Finally it is contended by counsel for appellant that, as ten years, lacking only four days, intervened between the death of N. P. Ragan, the father, and the date of the institution of this suit, a court of equity, in the exercise of its own inherent powers, independently of the statute of limitations, may and should refuse relief, on the ground of discouraging stale claims, or gross laches.

Much and excellent authority is cited by counsel in support of this proposition, but it has been decided that there is no such thing as a stale claim, properly so called, in this state; and by positive law, the statute of limitation is to be applied in our courts of equity as in our courts of law. With us no claim is barred until the limitation of the statute has accrued.

Hill vs. Nash, 19 *Southern*, 710; 73 *Miss.*, 862.

Since the complainant might have brought an action at law against the defendant, his cause of action does not rest upon the "existence of a trust not cognizable by the courts of the common law;" and it is not controlled by the provision of the Section 2763 of the code, limiting the period of ten years within which suit may be brought. It is governed by Section 2762 which declares that "whenever there be a concurrent jurisdiction in the courts of the common law and in the courts of equity, of any cause of action, the provisions of this chapter, limiting the time for the commencement of a suit for such cause of action in a court at common law, shall apply to all suits brought for the same cause of action in a court of equity."

Washington vs. Soria, 19 *Southern*, 487.

This case shows the legislative language making the Mississippi statute applicable to equity as well as to law, and it certainly is no stronger than the language of our own statute in Sec. 2938 of the Compiled Laws of 1897, originally enacted in 1858, at a time when all distinctions between law and equity and the separation of cases peculiar to the two jurisdictions had been done away with, as shown by quotation hereinbefore made.

Compiled Laws of 1865, *Sections* 5 *and* 6, *p.* 192.

This question does not appear ever to have been decided in this court, but there are two cases which are interesting. In one case the defense was set up of "laches, staleness of claim, and the statute of limitation of the state of Oregon." The suit was one in equity to foreclose mortgages on real estate, and the court goes on to show that the original demands upon the debt were not barred by the Oregon statute, and then proceeds as follows:

> The question of laches and staleness of claim virtually falls with that of the defense of the statute of limitations. So long as the demands secured were not barred by the statute of limitations there could be no laches in prosecuting a suit upon the mortgages to enforce those demands.
>
> *Cross vs. Allen,* 141 *U. S.,* 537.

The precise question was distinctly raised by counsel in the other case, *Bryan vs Kales,* which came up from the Territory of Arizona. The court did not pass upon it because it was not necessary, it being held that if the statute governed courts of equity as well as courts of law, the action was not barred by limitation, and if, as contended by defendants, a court of equity might deny relief because of laches, still there was no such laches as would bar the complainant.

Bryan vs. Kales, 134 *U. S.,* 126.

So far as we have had opportunity for examination, there is but one case which, *prima facie,* appears opposed to our views, and that is *Calhounn vs. Delhi,* 24 *Northeastern,* 27. Other cases cited by defendants in the territorial supreme court, and by that court in its

opinion, do not decide the point here urged, and even the *Calhoun vs. Delhi* case, when considered in the light of the New York statute, which is entirely different from that of New Mexico, cannot be taken as closely applicable. This is shown under the last heading of this brief.

B.

Our statute expressly provides in effect that no suit shall be barred within ten years.

We have thus far discussed the construction of the New Mexican statute, upon the idea that it does not attempt to enact that a cause of purely equitable nature shall be maintained if the same shall be brought within ten years, but only that it shall not be maintained after the lapse of ten years. If that were all that our statute contained, still the foregoing argument would be sound and convincing; but we now propose to show that the statute contains more, and expressly sets out that for which we contend.

By reference to Section 2938 of the Compiled Laws of 1897, it will be seen that the effective portion of it, preceding the provisos and exceptions, so far as it relates to suits in equity is, in substance, as follows:

> No person shall maintain any suit in equity for any lands but within ten years next after his right to maintain such suit shall have accrued, and all suits in equity for the recovery of any lands shall be sued within ten years next after the title or cause of suit accrued, and at no time after the ten years shall have expired.

If the law stopped at the first place where the word "accrued" appears, it might be urged with more plausi-

bility that it is what defendants have claimed and what the court below held; but the following clause shows that something more was intended by the legislature. To adopt the construction for which defendants contend, it is necessary to hold that this second clause is superfluous and meaningless, which is in violation of one of the cardinal rules for the construction and interpretation of statutes.

> In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all its parts harmonize if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the legislature intended any part of a statute to be without meaning.
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> *Potter's Dwarris on Stat.*, 144-5.

This rule has been more clearly and better stated by this court:

> Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning.
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> *Early vs. Doe*, 16 *How.*, 617.
>
> *Postmaster-General vs. Early*, 12 *Wheat.*, 152.
>
> *U. S. vs. Gooding*, 12 *Wheat.*, 477.
>
> *Market Co. vs. Hoffman*, 101 *U. S.*, 115-6.
>
> *Allen vs. Louisiana*, 103 *U. S.*, 84-5.
>
> *Montclair vs. Ramsdell*, 107 *U. S.*, 152.
>
> *U. S. vs. Fisher*, 109 *U. S.*, 145.

A careful examination of the language of the statute, with the purpose of giving full meaning to every word of the law, must convince any unprejudiced mind

that the law-makers had in view the destruction of the doctrine of laches and stale claims within the statutory period of limitations. If in the latter clause there had been inserted before the phrase "within ten years" the words "at any time," the meaning would have been unmistakable, but even without those words no effect can be given to what is really contained in the statute, except by holding that all suits shall be maintained if brought at any time within the ten years.

This view is strengthened by the strong and positive language of the proviso with regard to persons under disabilities which declares that such persons "shall and may, notwithstanding the ten years be expired, bring his or her suit or action."

If we thus give effect to what was the undoubted obvious intent of the legislature, and that intent, ascertained from the statute, of course, must govern, there can be no doubt as to the condition of the law in New Mexico. If we do not give the language this construction, we impute folly to the legislature in using superfluous and meaningless language, which is a violation of a well-known rule of construction.

C.

If it can be held that such a case as this can be barred in less than ten years, mere delay for less than the statutory period is not sufficient.

There is no authority which can be discovered against this position, no matter what the construction placed on statutes similar to ours. In the absence of

such a statute, there is no doubt that mere delay, unexplained, has been held to be sufficient to bar complainants in a court of equity, but no court has thus held in the face of such a statute. It is undoubtedly true that some courts have held that delay accompanied by other positive affirmative fact, indicating acquiescence, abandonment, fraud, express or implied, or deception, might be sufficient although less than the statutory period of limitation. We are necessarily led to a general consideration of the law of laches and we find that the term covers a good deal more than mere delay. It may be stated as a general proposition in harmony with all the adjudications on the subject, that the defense of laches will be sustained only when one or more of the following conditions exist:

1. When, owing to lapse of time and the death of parties and witnesses, the facts have become obscured and evidence has been lost so that the truth cannot be made manifest;

2. When, owing to change of parties, the coming in of innocent purchasers for value or other like changes, it would be inequitable to permit complainant to maintain his claim;

3. When there have been changes in the condition or value of the popedty, brought about by the labor or expenditure of defendant, induced by the culpable silence or acquiescence of complainant, so that it would be inequitable to permit the complainant to assert his original rights.

These are the reasons for the equitable doctrine of laches, and it is hardly necessary to cite cases in support of this statement of them. In the absence of a statute like ours, then, delay alone, unexplained, is

sufficient to justify a court in denying relief to a complainant. With such a statute as ours, mere delay is not sufficient unless accompanied by other acts of complainant or circumstances surrounding the case which make it inequitable to give the relief asked and impossible to compensate defendant for the injury which might thereby be inflicted. We assert that there is nothing in the circumstances of the present case which make it inequitable to give the complainants the relief to which they are manifestly entitled under the findings.

It has been repeatedly asserted by this court that no general rule as to laches can be laid down which would control in all cases, but each case must be decided upon its own peculiar circumstances; and in withholding or granting relief where the defense of laches has been interposed, the court lays great stress upon the presence or absence of special circumstances which make it inequitable or otherwise to grant what complainants ask. A few quotations will show this:

> No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so ob-

scured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in value, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like.

Hammond vs. Hopkins, 143 *U. S.*, 250.

And the question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that that the alleged rights are worthless or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

Galliher vs. Cadwell, 145 *U. S.*, 368.

The length of time during which the party neglects the assertion of his rights, which must pass

in order to show laches, varies with the peculiar circumstances of each case, and is not like the matter of limitations, subject to an arbitray rule. It is an equitable defense controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.

Halstead vs. Grinnan, 152 *U. S.,* 416-7.

The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect.

Penn. Mutual Life Ins. Co. vs. Austin, 168 *U. S..,* 698.

The property in dispute, it may well be assumed, has greatly appreciated in value since Mrs. Ordway's purchase, which was more than ten years prior to this suit. It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to the statutes of limitations; sometimes in analogy to them But it is now well settled that, independently of

> any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law.
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> *Abraham vs. Ordway*, 158 *U. S.*, 420.

Let us now briefly consider whether either of the three conditions, hereinbefore set forth as necessary to sustain the defense of laches, has any existence in the present case.

1 In the present case it cannot be contended that there has been any such lapse of time, and death of parties or witnesses as will so obscure the facts as to make them impossible of ascertainment. So far as the record discloses every one of the original parties to the compromise agreement is alive and accessible—at least the contrary of this has not been shown. All of the principal parties to that agreement are now parties to this suit. The evidence of no witness has been lost, although the opinion of the territorial supreme court, at pages 46 and 53 of the record, speaks of the absence of a witness named Burgess, but it appears from that opinion that Burgess' testimony would not have thrown any light on the original agreement or the acts of the parties under it, as he did not come on the scene until after the completion of work under that agreement. Moreover, the court was in no way embarrassed by his absence and

had no difficulty in finding the material facts as to the transactions about which there was any controversy.

2 There has been no change of parties interested in the property which can make it inequitable to deny complainants the relief which they ask. It is shown by the findings that there have not come in any new and innocent holders for value whom it is the duty of the court to protect. It is shown by the findings that, down to the time of taking the testimony, the holding of stock in the defendant company had not changed. Watson represented one-third, Hewitt onethird, and Fergusson onethird. These three have been parties from the beginning and cannot claim to have become owners or holders or claimants of the property in good faith for value in consequence of any act or omission on the part of complainants.

3 This brings us to the consideration of the third ground of the doctrine of laches, and that is as to the changed condition of the property. It would be idle to deny that the record discloses a change in the condition of the property, although the findings are not as definite and complete on this subject as they might be. They are in substance that Hewitt, Watson and Fergusson did much work and spent mcch money on the property, and in 1890 discovered a large body of rich ore from which they have taken out several hundred thousand dollars. It cannot be said, however, that defendants proceeded with their operations in ignorance of the rights of complainants. They knew all about them, and if they chose to proceed as they did, they

ought not now to be heard to say that there is anything inequitable in the assertion and maintenance of complainants' claims. No court would have maintained any suit brought to get rid of complainants, or to compel them to contribute to the development. The original partnership agreement under the compromise of 1883, was clarly limited as to its extent. It is obvious that the other partners could have no claim against complainants on account of any work which they might choose to do beyond that limit. There is no finding that their operations were induced by any culpable act, or failure to act, on the part of complainants.

If Watson and Hewitt chose to expend money in finding pay mineral, that would give them no claim against their co-partners in the absence of some agreement to that effect. No such claim would exist even if the deeds had all been made and the various equitable owners had been invested with their proportionate shares of the legal title and had become tenants in common. The only claim which even then could have been set up would have been as to their respective shares of the annual assessment work, and any expenditure above that amount which any owner chose to make, would have been at his own risk.

We will briefly call attention to a few authorities, selected from a greater number, which will show the correctness of the foregoing argument. First, as to the general proposition that mere delay or silence on the part of complainants is not enough to bar them, no

matter how long continued, if it does not extend beyond the statutory period of limitation.

There is no pretense that the defendants did not know their title and their rights quite as well as Mrs. Smith, and none that she in any way induced them to make this expenditure. She was simply passive in the matter and failed to object to the defendants doing what they did do. In this there was no element of estoppel. To constitute it the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct. See *Bowen vs. Bowen, supra,* at page 541. In cases of silence there must be not only the right but the duty to speak before a failure so to do can estop the owner. There was no such duty here. See *Viele vs. Judson,* 82 *N. Y.* 32.

Rubber Co. vs. Rothery, 107 *N. Y.,* 315-6.

Nor was there any case presented by the prayer that amounted to an estoppel. The principle has long been settled that a party is not estopped by his silence unless it has misled another to his hurt. *Hill vs. Epley,* 31 *Pa.,* 334.

Railroad Co. vs. Dubois, 12 *Wall.,* 64.

Where an express statute of limitation applies to a suit in equity, mere delay to commence the suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding.

And when the defendant relies on mere delay and his own adverse use, the statutory period hav-

ing expired, he must plead the statute. A party claiming the right to use water by adverse possession for the statutory time must set up the same as a defense in his answer. (*American Co. vs. Bradford, 27 Cal., 360.*)

Appellants contend that they had five years after their cause of action accrued within which to bring this action. It may be conceded, however, for all purposes of this case, that the code of civil procedure limited them to four years.

It has been repeatedly decided in this state that Section 343 of the code of civil procedure ("An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued") applies as well to suits in equity as to actions at law. The same effects positive and negative, follow from Section 343 as from other sections of the code, prescribing the periods within which actions may and must be commenced. With reference to other limitations, a party cannot be refused a hearing if he shall bring his action within the period named; and as to suits to which Section 343 is applicable, mere lapse of time, less than four years, is not ground for defense. Throughout the code suits in equity are called actions. Sections 346 and 347 expressly relate to certain suits in equity. Section 307 declares "there is but one form of civil action," etc. That section does not abolish the distinction recognized by the constitution between law and equity, but it indicates the legislative intent that the subsequent provisions of the code should be applicable to legal and equitable proceedings. The word "hereinbefore" in Section 343 has never been held to limit its operation to actions at law, but it has often been held to the contrary.

Lux vs. Haggin, 69 Cal., 267.

We invite particular attention to this case of *Lux vs Haggin*, as it goes on to discuss at great length the argument in favor of a court of equity declining to interfere by way of injunction, when there had been laches although the statutory period of limitation has not expired. Pages 268 and 284.

Wood on Limitation, Secs. 61, 62 and 63.

Kline vs. Vogel, 90 Mo., 250-1.

Perry on Trusts, Sec. 850.

The doctrine of staleness of demand relied on as a defense in this case cannot, under the facts shown in this bill be sustained. Laches, as has been well said, does not, like limitations, grow out of the mere passage of time, but it is founded on the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation of the property or the parties. *Galliher vs. Cadwell*, 145 *U. S.*, 368, 12 *Sup. Ct.*, 873. Whenever such manifest inequity does not appear, "a case does not fall within the operation of the rule, if the suit is for the recovery of property, real or personal, unless it is apparent on the face of the bill, that for the period prescribed as a bar to the corresponding legal remedies, there has been a possession hostile to the title the complainants assert. *Shorter vs. Smith*, 56 *Ala.*, 208; *Scruggs vs. Land Co.*, 86 *Ala.*, 173, 5 *South*, 440.

Waler vs. Nelson, 18 *Southern*, 155, (*Alabama.*)

The doctrine of equitable estoppel by matter in pais, has doubtless been greatly extended by the courts in modern times; yet, it is not entirely without limits, and it professes to be founded upon the principles of natural justice. The general principle now is that where the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting, to the pre-

judice of that other, the contrary of that of which his conduct has induced the belief. The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he atempts to set up. Thus, if a person positively encourages another to purchase either land or a chattel, he cannot afterwards assert any title in himself to the thing purchased, and this though he may have been ignorant of his rights when he gave the encouragement. For though in the latter case there may have been no fraudulent intent, yet the assertion of his title would operate as a fraud, as much as if there had been a fraudulent purpose. Besides the equitable principle is, that when a loss must befall one of two innocent persons, that one must bear it through whose act it was occasioned. It seems also to be well settled, that silence in some cases, will estop a party against speaking afterwards. Thus, if one suffers another to purchase and expend money upon a tract of land, and knows that that other has a mistaken opinion respecting the title to it, and does not make known his claim, he shall not afterwards be permitted to set up a claim to that land against the purchaser. His silence then becomes a fraud. But, silence without such knowledge works no estoppel. It is only when silence becomes a fraud, that it postpones: *Beauland vs. McKeen*, 4 *Casey*, 124; *Robinson vs. Justice*, 2 *Penn.*, 19; *Keeler vs. Ventuyle*, 6 *Barr*, 253. The doctrine of estoppel, by matter in pais, resting thus upon the supposed existence of a fraud, it is essential to its being allowed in any case, that it would work an injury, if the party alleged to be estopped should be permitted to set up his case. If

no one has been misled to his hurt, if no injury has arisen from the conduct, declarations or silence of a party, he will not be estopped from contradicting them even though they would be conclusive against his right if not contradicted. *Dezell vs. Odell*, 3 *Hill*, 215; *Patterson vs. Lytle*, 1 *Jones*, 53. If, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel. Accordingly, it has been held that one is not relieved, who had the means of becoming acquainted with the extent of his rights: *Crest vs. Jack*, 3 *Watts*, 240; *Hepburn vs. McDowell*, 17 *S. & R.*, 383; and in *Knouff vs. Thompson*, 4 *Harris*, 361, it was ruled, that silence does not estop when the party's deed is on record. It should never be forgotten, that there is a wide difference between silence and encouragement.

Hill vs. Epley, 31 *Pa. State*, 333-4.

The principle invoked is, that one should be estopped from asserting a right to property, upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate, stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work, or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case, will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title or with the fact that he had none.

Steel vs. Smelting Co., 106 *U. S.*, 456.

It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, " the doctrine proceeds upon the ground of constructive fraud or gross negligence, which in effect implies fraud. And, therefore when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1 *Story Eq.*, 391. To the same purport is the language of the adjudged cases. Thus it is said by the supreme court of Pennsylvania, that "the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up." *Hill vs. Epley*, 31 *Pa. St.*, 334; *Henshaw vs. Bissell*, 18 *Wall.*, 271, (85 *U. S. XXI.*, 840); *Biddle Boggs vs. Mining Co.*, 14 *Cal.*, 368; *Davis vs Davis*, 26 *Cal.*, 23; *Com. vs. Moltz*, 10 *Pa.*, 531; *Copeland vs. Copeland*, 28 *Me.*, 539; *Delaplaine vs. Hitchcock*, 6 *Hill*, 616; *Hawes vs. Merchant*, 1 *Curt., C. C.*, 136; *Zuchtmann vs. Roberts*, 109 *Mass.*, 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of

which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established.

Brant vs. Virginia Co., 93 *U. S.*, 336.

That one who has violated a duty which he owes to another, and thereby obtained that other's property, should be allowed to say that he may retain it because an action has not been brought promptly, even though the statute of limitations has not run, seems inequitable and unjust, and, as is shown in the case last above referred to, he will not be allowed to do so unless the party complaining has knowingly acquiesced in the conveyance, or done some affirmative act calculated to induce the belief that he does not intend to question it, or there are such facts and circumstances in the case as indicated that the action is speculative. In other words, if a court of equity can grant relief against the abuse of the relations of trust and confidence arising out of the relation of atorney and client, without injury to the defendant or other interested parties, we see no reason why a period of delay in bringing a suit less than that fixed by some statute of limitations should bar the right of complainants.

Ross vs. Payson, 43 *N. E.*, 402.

In a late case in this court, decided in February, 1899, the law is quite fully discussed, in the light of reasoning applied to the facts, and also in the light of precedent; and, perhaps more completely than ever, the idea is enforced that each case must be decided according to its own special facts and circumstances. It plainly shows that in cases where a trust is clearly established by the testimony, or where fraud is clearly proved, or where the property has not passed into the

hands of persons innocent of the fraud and without notice thereof, and lapse of time has not obscured the facts or caused the loss of testimony, relief will be granted notwithstanding great delay on the part of a complainant. All of these reasons for granting relief exist in the present case.

McIntyre vs. Pryor, 173 U. S., 53 et seq.

The case of *Johnston vs. Standard Mining Co., 148 U. S., 370*, at the first glance would appear to be a strong authority against our contention; but a little examination will disclose the fact that in addition to the mere delay and neglect of the complainant, there were other facts in the case, of the nature of those to which we have already adverted as essential to the application of the doctrine of laches. In that case the property concerning which Johnston had made a contract in 1880, had passed into the ownership of a stock corporation, of the formation of which plaintiff had knowledge and in which he expected to receive stock; and the court says that at the time of the institution of the suit a large proportion, if not a majority of the stock, had passed into the hands of innocent purchasers who were entirely ignorant of the contract. It is also declared that the plaintiff ought to have known all that was taking place with respect to the title and development of the property, as the circumstances were such as to put him on inquiry. In the present case there is no finding, and, therefore, presumably, no evidence to show that any facts were ever brought to the knowledge of the complainants prior to 1892 which were such as to put

them upon inquiry as to the development of the property. It will be readily seen that some of the most important considerations which led to the decision of the court in the Johnston case have no existence in the present litigation.

In this court relief has more frequently been denied upon the ground of change of parties so that defendants could have no knowledge of the original transactions, than upon any other.

We call special attention to *Hanner vs. Moulton,* 138 *U. S.,* 495, and *Johnston vs. Standard Mining Co.,* 148 *U. S.,* 368-9.

As we have already shown no similar state of facts exists here. The parties defendant are original parties to the transaction and up to the time of the institution of the suit and even down to January, 1896, when defendants took their proofs, there had been no substantial change in the ownership of the property, as will be seen by reference to the 18th finding of the courts below.

In the case of *Ross vs. Payson,* above cited, it is declared that the defendant cannot be injured by granting the prayer of the bill because he can "by a fair accounting be fully compensated for all the money he has expended, either in the purchase, improvement, or payment of taxes upon the land."

In like manner if the defendants in the present case have been in any way injured they can be compensated upon an accounting as to what they have done with the property. We claim, however, that what they did was

of their own volition, at their own risk, and that they have no right to bind complainants for any portion of their expenditures upon the property.

FIFTH POINT.

The unsatisfactory opinion of the Territorial Supreme Court.

The above heading naturally provokes the sarcastic comment that any opinion adverse to complainants must necessarily be very unsatisfactory, to them at least, but it is not because it is adverse that we here contend that it is unsatisfactory. We intend to assert that it is intellectually unsatisfying, because it is inaccurate and inadequate.

We are well aware that this opinion is no part of the record, and that, as has been declared by this court, it is immaterial by what process of reasoning the court below reached its conclusion.

Mobile vs. Eslava, 16 *Pet.*, 245-6;
Davis vs. Packard, 6 *Pet.*, 48;
England vs. Gebhardt, 112 *U. S.*, 506.

We cannot, however, shut our eyes to the fact that, upon appeal to this court, after an appellant has suffered two adverse decisions, one in the court of original jurisdiction and another in an appellate court, there must necessarily be some presumption in favor of the action of the lower courts against him, and it is with the hope of meeting or dissipating that presumption that we feel called upon to make some comments upon the reasoning and arguents by which the supreme court of New Mexico has attempted to support its conclusion.

We do not intend any disrespect toward that court, nor do we desire to depreciate its learning and ability; but we would not be here with this appeal if there did not appear to us reason to believe that a mistake had been made in the decision against us. We ought to say, however, that the five judges of the supreme court of New Mexico, in addition to their duties as members of the appellate court, are required to hold during the year more than fifty terms of courts of original jurisdiction in many different places scattered over an immense area, and it is not within their power to give all the time and attention to every case which its importance may demand and which they themselves would desire. We believe the present case is a conspicuous instance of this kind.

The opinion of the court will be found on pages 38 to 63 of the printed record. First comes the syllabus and then the statement of facts, both prepared by the court, the statement of facts being made up principally of the findings made by the district court. On page 44, near the foot of the page, the court begins a summary of the facts found by the district court. This summary is the foundation upon which the court bases its opinion, and from it, we select the following as instances of the inaccuracy in the opinion of which we complain, and which, as we submit, pervades the whole of it.

First, the opinion asserts that the district court found that, "if any labor was performed on behalf of C. Ewing Patterson during that time, it was by or under the direction of Henry J. Patterson and

Watson as his representatives;" but nothing like this is to be found in the findings, all that there is on the subject being in the 11th and 12th findings to which attention is invited.

Second, the opinion asserts that the district court found "that demand was made upon Hewitt for the execution of deeds conveying the interests of the Pattersons in said property to them as early as April, 1885"; but this is directly contradicted, so far as C. Ewing Patterson is concerned, by the 15th finding.

Third, the opinion asserts that the district court found that "the defendant, Burgess, attorney in fact, "did not "perfom any labor or contribute any money towards the assessment work or the development of the property in the absence of the Pattersons"; when there is no finding that Burgess was attorney in fact for anybody, or that he did, or did not, do anything, the only reference to him being in the 22nd finidng where he is mentioned as "agent" of Henry Patterson, and he was not a defendant.

Fourth, the oponion asserts that the district court found "that the property was of little known value, but on the contrary its value prior to the year 1890 was entirely uncertain and speculative"; but a careful examination will disclose no such finding whatever.

Fifth, the opinion asserts that the district court found "that during the fall of 1890 the development work done by Hewitt, Watson and Fergusson and others, not including the appellants, resulted in the discovery of large bodies of rich ore in the mines located by Hewitt and referred to as 'The Old Abe' Mine; that the property at that time rapidly advanced in value and became of great certain value"; when as matter of fact no such finding was ever made. The court carefully avoided any finding that the discovery of rich ore in 1890, "re-

sulted" from the development work done by Hewitt et al. probably because the judge was unwilling to pass on the issue raised by defendants' denial of the allegation in the 4th paragraph of the bill of complaint, that complainants in 1883 discovered the lode upon which the operations of the defendant company have been carried on, and also because he was not able to say that the much talked-of expenditures of time and money prior to 1890 had been of any value whatever to the property. An inspection of the careful wording of the 16th and 17th findings will show the correctness of these views. For all that appears, the work done from 1885 to 1890 was of the most futile, foolish and worthless character, and did not contribute in the slightest to the improvement of the property.

Sixth, the opinion asserts that the district court found "that the agent Burgess, left the Territory of New Mexico prior to the trial of this cause, and his place of residence being unknown, his attendance could not be procured as a witness, and his testimony could not be obtained at the trial of this cause"; when there is absolutely no finding whatever on this subject. Moreover, there is nothing in the record to show that it is of any importance, and the little which appears in another part of the opinion (pages 53-4) shows its immaterial character.

We respectfully submit that the foregoing indicates a strong though unconscious bias and prejudice on the part of the writer of the opinion, which has been productive of manifest error and which tends to impair confidence in any part of the opinion.

We invite attention to the fact that this opinion fails to give any consideration whatever to the point which

was made in the territorial court, the same as here, that the agreement found in the district court was one of partnership between the parties to it. It must be assumed that it was not thought worthy of serious or any consideration.

The opinion devotes a great deal of space to the establishment of the undisputed doctrine that each case in which the defense of laches is interposed, must be decided upon its own circumstances, and that no general rule can be laid down which will govern all cases. It does not, however, take any distinct notice of the position of appellants that mere delay in the assertion of rights is not sufficient to bar a suitor in equity, and that in this case the findings of fact impute to complainants nothing more than mere delay. This omission is undoubtedly to be attributed to the fact that the court could discover nothing in the conduct of compplainants which could have misled or deceived defendants or induced them to do any act from which they might suffer injury.

The court evidently recognized the accuracy and justice of the proposition, which is set out under subheading "C" of the 4th point of this brief, as to the conditions which must exist before the defense of laches can be sustained, but the opinion does not distinctly and clearly set out this doctrine. It does, however, make some effort to meet those conditions. The first, as we have stated it, is that the defense will be sustained "when, owing to lapse of time and the death

of parties and witnesses, facts have become obscured and evidence has been lost, so that the truth cannot be made manifest."

In its attempt to show that this condition existed, the court felt compelled to speak as follows:

> Again, a change in the relation of the parties and the death or absence of witnesses are considered by the courts of equity in applying laches to stale claims. It is true that in this case death did not intervene to prevent the production of material testimony, but it is a fact that the witness, Burgess, who remained in the vicinity of the property and who knew the appellees were developing the property, and who acted as the agent of one or both of the appellants, and whom the testimony shows to have been in correspondence with one or both of the appellants, left the Territory in 1891, and his whereabouts being unknown, his testimony could not be obtained in this case, and yet it is apparent that his testimony would have been of great materiality and value. If his place of residence was known to the appellants, it was not divulged, and, therefore, his testimony was not available even by deposition, and the power of attorney, which constituted his authority to act, as testified by Henry J. Patterson, was also absent and could not be produced in evidence. The long delay in the commencement of this suit undoubtedly produced this result, for had the suit been commenced at any time up to and including the year 1890, the testimony of Burgess could have been produced, as he was within the jurisdiction of the court. (*Pages* 53-4 *of Record.*)

Much of this is as to matters not in the record on this appeal. It is plain, however, that this single witness, of the loss of whose evidence so much is sought

to be made, was no party to the transactions between complainants and defendants out of which this litigation arose, and that his absence in no way disabled the court from making full and complete findings as to everything necessary to fix the respective rights of the parties. We do not feel at liberty to criticise this or other portions of the opinion as to any inaccuracies in statements of fact, as we are limited here to those facts which are shown by the record.

The second of the conditions, of which one or more must exist in order that the defense of laches be sustained, is "when, owing to change of parties, the coming in of innocent purchasers for value or other like changes, it would be inequitable to permit complainant to maintain his claim." As to this, the learned court below in its opinion, uses the following language:

> Neither can it be said that there was no change in the relation of the parties to the property prior to the commencement of this suit, because the Old Abe corporation was organized in 1892, and the whole, or almost the entire property, was conveyed to it by Hewitt, the locator of the property, and those to whom he had conveyed, and the company had issued stock in lieu of the individual interests in the property. It is true that the Old Abe Mining Company was organized by Hewitt, Fergusson, Watson and others, and the stock was divided between them, and doubtless remained so up to the time of the trial, but at least the appellee, Mathew Hoyle, came into the possession of his rights by a conveyance from Watson, dated June 9, 1890, and Hoyle conveyed five forty-eights (5-48) of the property to the Old Abe Company, retaining one forty-eighth (1-48). He therefore

> acquired whatever interest he had in 1890 prior to the enhancement of the value of the property and conveyed to the company a portion of his holdings after the property had largely increased in value. So that while the change of the relation of the parties to the title was not radical there was a change which, owing to the enhancement of the value of the property, became an important one, when the prayer of the bill, as to the relief sought, is considered. (*Page* 54 *of Record.*)

The illogical part of this is to be found in its reference to the prayer for relief in the bill of complaint. There being a prayer for general relief, the specific relief prayed for is unimportant if the facts found make a case entitling complainants to the assistance of a court of equity. It is to be noted, however, as we have heretofore pointed out, that even in this statement in the opinion of the court, there is no substantial change of parties shown which would in any way interfere with giving complainants all that they pray without interfering with the rights of any innocent holders. There is nothing in the findings about the defendant, Hoyle, who is referred to in the opinion, but it is still clear that the other defendants retain enough of the property to make it possible to give complainants their rights without interfering with Hoyle, and it is to be noted that even in the prayer for relief complainants ask that the court should make such provision in its decree as might be necessary and proper for the protection of stockholders other than Hewitt. There is no practical difficulty in the way of doing this, so that we insist that the opinion of the court below fails entirely to show that

there has been such change of parties as to make it inequitable to permit complainants to maintain their claim.

The last of the three conditions referred to, is "when there have been changes in the condition or value of the property brought about by the labor or expenditure of defendant induced by the culpable silence or acquiescence of complainant, so that it would be inequitable to permit complainant to assert his original rights." There is a great deal said in the opinion of the court below, on pages 51 to 53, about changes in the value of the property, which it is unnecessary to attempt to quote here. Much of what is there said, goes far beyond anything to be found in the findings of fact. Those findings do not in terms declare that there was any change in the value of the property, or that any such change had been brought about by the exertions of defendants. But this is unimportant, because with all the multitude of words on this subject in the opinion of the court, at the pages last cited, and on pages 55 and 56, no act or omission on the part of complainants is pointed out which misled or deceived or imposed on defendants; or, to state it defferently, there is nothing to show "any labor or expenditure of defendants induced by the culpable silence or acquiescence of complainants." Neither the findings of the courts nor the opinion of the supreme court, contain a hint that defendants were induced or led to perform any labor or make any expenditure upon the property by the failure of complainants to assert their rights at an earlier time.

We submit that these criticisms should be convincing, that neither one of the conditions, one or more of which is essential for the defense of laches, existed in the present case, for it must be conceded that the opinion of the territorial supreme court says all that possibly can be said against us, and as we believe, much more than ought to be said.

On page 57, the opinion of the court quotes our condensation of Section 2938 of the Compiled Laws of 1897, and without giving the slightest consideration to our argument that the first clause of the section would be sufficient without more, to make the statute one of mere limitation, goes on to declare an inability to see anything in this section of the statute beyond the simple provision that after ten years have elapsed, no suit can be brought for the recovery of lands in a court of law or equity. We submit that the opinion is inadequate and unsatisfactory when it pays no attention whatever to an argument of this kind.

In support of the court's construction of the statute, the opinion cites eight cases. Those cases are as follows:

Calhoun vs. Delhi &c. R. R. Co., 24 *N. E. Rep.* 27.
Mason vs. Sanford, 137 *N. Y.*, 497.
Boyer vs. East, 161 *N. Y.*, 580.
Old Colony Co. vs. Dubuque Co., 89 *Fed Rep.*, 794.
Hubbard vs. Manhattan Co., 87 *Fed Rep.*, 51.
Continental Bank vs. Heilman, 86 *Fed. Rep.*, 514.

Graff vs. Portland Town Co., 54 *Pac.*, 854.
Alsop vs. Riker, 155 *U. S.*, 448.

We respectfully submit that, with the exception of the first of these eight cases, none of them tend in any way to support the position of the court, and even in that case, when we look into the statute which is under consideration and compare it with the statute of New Mexico, the applicability of the case becomes less apparent. The New York statute is as follows:

> An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.
>
> *N. Y. Civil Code, Sec.* 388.

It has been held by the courts of New York that this section applies to suits of equitable jurisdiction, and so far as we are informed, this is the only now existing statute of limitation in New York which is so applicable. The difference between the language used in the New York statute and in that of New Mexico, does not need to be pointed out. Certainly, the New York statute contains nothing to indicate that the legislature had specially in mind the subject of cases of equitable jurisdiction or any of the peculiar doctrines of equity applicable to such cases.

The question considered in *Mason vs. Sanford* does not appear to come as near to the present case as the one first referred to. The court was considering the time within which application could be made for the revival of actions by the substitution of a representa-

tive of a deceased party, and declared that in legal actions there was no mere time limitation, while in equity actions there was a time limitation of ten years, but in both classes of cases the application to revive might be denied on account of laches, even though in an equity case the ten years might not have passed. Without going further, it is quite obvious that an entirely different set of considerations arise upon applications to revive actions from those to be applied to a simple statute of limitations.

It is safe to assert that the third of the cases cited by the court below has not the remotest applicability. In that case, the plaintiffs were absolutely barred by the terms of the New York statute of limitations. It was a case of heirs attacking the validity of a sale of real estate made while they were infants, the action having been brought eight years after the younger of the two heirs had become of age. The New York statute of limitations as to disabilities of different kinds, declares, in substance, that the time of the disability is not a part of the statutory period of limitation, except that the time so limited cannot be extended in any case more than one year after the disability ceases.

N. Y. Civil Code, Sec. 396.

The case of the *Old Colony Trust Co. vs. Dubuque Light and Traction Co.*, 89 *Fed. Rep.*, has no reference whatever to the construction of any statute of limitations, but only to a defence of laches based upon delay in bringing the suit, and the court held against the defence because it did not appear that the position and re-

lations of the parties had been changed in any substantial particular before the petition was filed.

The same thing can be said as to the case of *Hubbard vs. Manhattan Trust Company.*

In the case of the *Continental Bank vs. Heilman, 86 Fed. Rep., at page* 516, it appears that the federal court while recognizing the applicability of the Indiana statute of limitation as to the bringing of a suit by a creditor out of the state against the heirs, devisees, and distributees of a decedent, clearly holds that the jurisdiction of a federal court and the methods and principles upon which it is exercised, are not to be affected by the legislation of a state, and, therefore, inexcusable laches for less than the statutory period of limitation is a good defence in that court.

In *Graff vs. Portland Company, 54 Pacific, at pages* 856-7, it appear that the court was not considering the applicability of any statute of limitations, but only the question of laches. The nearest approach to a statute of limitations, is in the following language:

> No specific limit of time can be fixed within which the doctrine may be successfully invoked in courts of equity. It is not essential that such time should have elapsed as to make the statute of limitations effective. Mere lapse of time of itself, unless sufficient to operate as a statutory bar, may not always be adequate; but when coupled with such conditions and acts of the parties as to indicate assent, acquiescence or waiver, it may.

The last of the citations by the territorial court, is that of *Alsop vs. Riker, 155 U. S., 448.* In that case, this court, on page 460, said that it was inclined to

think that the suit could not be excluded from the operation of the statute of New York prescribing a limitation of six years, but without placing the decision upon that ground, and independently of the statute, it was said that the case was one in which a court of equity should refuse to interpose, because of laches on the part of appellant, and then follows a reiteration of the frequently expressed view, that laches may bar a suit even though less than the statutory period has elapsed. There is nothing to indicate that the court was considering any such statute as that of New Mexico.

If these citations are the best which can be made in support of the effort to ignore and disregard a large portion of the language of our statute,—and we believe they are,—it is certainly clear that the construction given by the court below, cannot rest upon precedent and authority.

On page 60 of the record, the opinion quotes Section 2916 of the Compiled Laws of New Mexico, which is a part of the statute of limitations, and reads as follows:

> Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified, within four years.

The learned court thereupon goes on to hold that this case is not one "for lands" or "for the recovery of lands," and is barred by Section 2916. It is well set-

tled that the bar of a statute of limitations must be set up by the defendant in some formal way in the record, in order to be available.

Buswell on Limitations, 525 *et seq.*;
13 *Encyc. P.* & *Pr.*, 181;
Sanger vs. Nightingale, 122 *U. S.*, 183;
Retzer vs. Wood, 109 *U. S.*, 187.

In the present case, no statute of limitations was pleaded by defendants, and it is too late for them to find any protection by its provisions in an appellate court; but even if this were not so, the Section 2916 above quoted, can have no application to this case. The ten year statute of limitations as to suits "for lands" or "for the recovery of lands," was passed in 1858, and was expressly preserved by the terms of the act of 1880, of which the said Section 2916 was a part, as will be seen by reference to Section 2929 of the Compiled Laws of 1897, which reads as follows:

> Sec. 2929. None of the provisions of this act shall apply to any action or suit which, by any particular statute of this territory, is limited to be commenced within a different time, nor shall this act be construed to repeal any existing statute of the territory which provides a limitation of any action; but in such cases the limitation shall be as provided by existing statutes.

It is believed that in 1880 the only territorial statutes of limitation in force, were the one year limitation as to actions of replevin, and the ten year statute above referred to. It is difficult to understand how it can be

seriously asserted that the present case is not one for the recovery of lands. If complainants are entitled to anything, they are entitled to a conveyance of the legal title to an undivided one-fourth part of the mining property embraced within the two claims located by Hewitt in 1884 under the agreement to which he and complainants were parties, and, incidentally, to an accounting by defendants as to the rents and profits.

Section 4014 of the Compiled Laws of New Mexico of 1897, a portion of the statute concerning suits to quiet title, says that "For the purposes of this act, and for all other purposes, mines shall be deemed and taken to be real estate."

It is obviously impossible for us, within any reasonable limits, fully and closely to review the opinion of the territorial supreme court. Those matters to which we have specifically called attention, may fairly be taken as samples of the whole. Much might be said of its unfairness, although, of course, unintentional and unconscious, in its statements of appellants' arguments and position,—an unfairness into which the court was probably betrayed by assertions in the brief of appellees as to what were the contentions of appellants,—but we believe that we have already said more than enough to convince the court that our case did not receive such consideration in the territorial supreme court that the adverse decision of that court can be considered as raising any reasonable presumption against the justice of our claims.

It is respectfully submitted upon the findings made by the courts below, that the decree in this case should be reversed and this case remanded to the supreme court of the Territory of New Mexico, with directions to set aside its decree and to remand the case to the district court of Lincoln county for the entry in that court of a decree in favor of complainants, in accordance with the prayer of their bill of complaint, due regard being had to the protection of the interests of innocent purchasers for value, if any there be, of any portion of the property in controversy, and for such further proceedings as may be necessary.

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